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Court of Appeals  
Division III  
State of Washington  
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COA NO. 36320-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

EVAN D. SCHRODER,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR WHITMAN COUNTY

The Honorable Gary Libey, Judge

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BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The warrantless arrest violated appellant's right to privacy under article I, section 7 of the Washington Constitution and the Fourth Amendment of the United States Constitution.

2. The court erred in denying appellant's CrR 3.6 motion to suppress evidence obtained from the unlawful arrest.

3. The court erred in entering these CrR 3.6 conclusions of law:

a. "The Court finds that based on the information above, Deputy Cox had probable cause to arrest the Defendant for DUI." CP (CL 1).

b. "Because Deputy Cox had probable cause to arrest for DUI, the Defendant's BAC results are admissible at trial." CP 57 (CL 2).

**Issue Pertaining to Assignments of Error**

Whether appellant's initial arrest for driving with a suspended license was unsupported by probable cause, thereby violating appellant's constitutional right to privacy, rendering the subsequent arrest for DUI unlawful, and requiring suppression of the evidence obtained from the illegal seizure?

**B. STATEMENT OF THE CASE**

Evan Schroder appeals from his conviction for driving under the influence of an intoxicating liquor (DUI). CP 64-68.

## 1. Suppression Hearing

Schroder moved to suppress evidence, arguing the DUI arrest was unsupported by probable cause. CP 6-8. The State opposed the motion, arguing officers had probable cause to arrest for driving with a suspended license and reasonable grounds to believe Schroder was driving while under the influence of intoxicating liquor. CP 69-74. A CrR 3.6 evidentiary hearing took place. RP<sup>1</sup> 6-24. After considering the evidence produced at the hearing, the court entered the following findings of fact.<sup>2</sup>

In October 2017, Deputy Cox, Deputy Olin and Sergeant Brown responded to a call of shots fired in the town of Tekoa. CP 56 (FF 1). After speaking with the reporting party, the deputies obtained a description of the vehicle which left the scene. CP 56 (FF 3). They believed Schroder was the driver. CP 56 (FF 3). Based on the information provided, the deputies began to search the town for the vehicle. CP 57 (FF 4). Deputy Olin was the first to observe it. CP 57 (FF 5). He activated his emergency lights. CP 57 (FF 6). The driver of the vehicle drove several more blocks, driving through several stop signs, before bringing his vehicle to a stop. CP 57 (FF 7). The driver then exited

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<sup>1</sup> This brief cites to the verbatim report of proceedings as follows: RP - one volume consisting of 7/18/18, 7/23/18, 8/10/18, 8/17/18, 8/31/18, 9/7/18.

<sup>2</sup> The written "findings of fact and conclusions of law" are attached as appendix A.

his vehicle and ran to some nearby buildings. CP 57 (FF 7). The driver, identified as Schroder, was eventually found and taken into custody. CP 57 (FF 8). Once apprehended, Deputy Cox observed Schroder's eyes were blood shot and watery, his speech was slow and slurred, and he had the odor of alcohol on his person. CP 57 (FF 9). Cox asked Schroder several times if he would be willing to perform field sobriety tests but Schroder did not give a direct answer. CP 57 (FF 10). Cox asked if he would submit to a portable breath test. CP 57 (FF 11). Schroder refused. CP 57 (FF 11). Schroder was eventually arrested for DUI. CP 57 (FF 12).

The court concluded Deputy Cox had probable cause to arrest Schroder for DUI "based on the information above." CP 57 (CL 1). It also concluded Schroder's breath test results were admissible because there was probable cause to arrest for DUI. CP 57 (CL 2).

## **2. Jury Trial and Sentencing**

The State proceeded to trial with charges of DUI and attempting to elude police. CP 1-3; RP 43-44.<sup>3</sup> Evidence presented at trial was consistent with evidence from the CrR 3.6 hearing. When Sergeant Brown saw Schroder, he ordered him at gunpoint to the ground and police took him into custody. RP 142, 161. Deputy Cox initially placed him

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<sup>3</sup> The State originally charged Schroder with driving with a suspended license "out of Idaho" but dropped the charge before trial because the State did not think it could prove it. RP 43-44.

under arrest for driving while suspended. RP 162, 171. While Deputy Olin spoke with Schroder, Cox smelled the strong odor of intoxicants coming from Schroder's breath, his speech was slow and slurred, and his eyes were watery and bloodshot. RP 162. After Schroder refused to take the field sobriety tests, Deputy Cox arrested him for DUI as well. RP 163-64, 171. Video of the encounter was admitted into evidence. Ex. 8; RP 144. Police transported Schroder to the county jail. RP 164. In response to questioning, Schroder admitted to consuming alcohol that evening. RP 165-66. Police gave Schroder a breath test. RP 166. The breath test results were slightly above 0.08. RP 203-04. Trooper McKee, testifying as an expert witness, said 0.08 is the level at which everyone is affected by alcohol and should not drive a motor vehicle. RP 209.

The to-convict instruction for the DUI charge sets forth two alternative means of committing the offense: that Schroder "(a) was under the influence of or affected by intoxicating liquor" or "(b) had sufficient alcohol in his body to have an alcohol concentration of 0.08 or higher within two hours of driving as shown by an accurate and reliable test of the defendant's breath." CP 35.

The jury acquitted Schroder on the eluding charge. CP 50. It returned a general verdict finding him guilty of DUI. CP 51. The court

imposed a sentence of 45 days in jail and suspended 319 days for a period of two years. CP 59. This appeal follows. CP 64-68.

**C. ARGUMENT**

**1. THE WARRANTLESS ARREST VIOLATED SCHRODER'S CONSTITUTIONAL RIGHT TO PRIVACY BECAUSE IT WAS UNSUPPORTED BY PROBABLE CAUSE, REQUIRING SUPPRESSION OF EVIDENCE AND REVERSAL OF THE CONVICTION.**

Police administered a breath test pursuant to the implied consent statute. A lawful arrest is a prerequisite to application of this statute. The arrest can be for any offense, but that arrest needs to be supported by probable cause. Police initially arrested Schroder for driving with a suspended license. The court's findings do not establish probable cause to believe Schroder committed that offense. Police subsequently arrested Schroder for DUI. But the arrest for DUI is unlawful because the information relied on by police officers to arrest for DUI was obtained subsequent to the initial illegal arrest for driving with a suspended license for which there was no probable cause. The breath test results must therefore be suppressed under the exclusionary rule. Further, police observations that were made subsequent to the initial unlawful arrest, the videotape evidence, and Schroder's statements to police are all fruit of the initial unlawful arrest and must be suppressed as well. The conviction

cannot stand because the suppression error is not harmless beyond a reasonable doubt.

- a. **The court erred in denying the motion to suppress because the findings entered by the court do not support a conclusion that the arrest was lawful.**

"When reviewing the denial of a suppression motion, an appellate court determines whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law." State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). There are no disputed findings of fact here. They are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Schroder disputes the conclusions of law, which are reviewed de novo. Garvin, 166 Wn.2d at 249. Whether probable cause exists is a question of law reviewed de novo. State v. Wagner-Bennett, 148 Wn. App. 538, 541, 200 P.3d 739 (2009).

The written findings of fact do not support the conclusion that police had probable cause to arrest for DUI and that the breath test results were admissible. At the court's request, the State prepared the findings. RP 23-24, 272. "When the State successfully resists a motion to suppress, it is obligated to procure findings of fact and conclusions of law that, *standing on their own*, will withstand appellate scrutiny." State v. Watson, 56 Wn. App. 665, 666, 784 P.2d 1294, review denied, 114 Wn.2d 1028, 793 P.2d

974 (1990). "Where a defendant contends evidence was taken in violation of his constitutional rights, and makes an appropriate challenge to the suppression court's findings . . . we are required to look behind the formal findings. When, however, the facts found do not support the conclusion to suppress, it is the state not the defendant who would seek to expand or enlarge upon its own product." State v. Poirier, 34 Wn. App. 839, 841, 664 P.2d 7 (1983). The reviewing court cannot go beyond "the facts as reflected in the findings prepared by the State and entered by the suppression judge" in determining whether the conclusion of law is supported. Id.

The Fourth Amendment to the United States Constitution and article 1, section 7 of the Washington Constitution require that warrantless arrests be supported by probable cause. State v. Bonds, 98 Wn.2d 1, 8-9, 653 P.2d 1024 (1982); State v. Grande, 164 Wn.2d 135, 141, 187 P.3d 248 (2008). "[T]he probable cause analysis under the Fourth Amendment is substantively the same analysis as the probable cause inquiry under article I, section 7." Grande, 164 Wn.2d at 141. "Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed." State v. Terrovona, 105 Wn.2d 632, 643, 716 P.2d 295

(1986). "Probable cause cannot be supported by information police gain *following* an arrest." State v. Mance, 82 Wn. App. 539, 542, 918 P.2d 527 (1996).

The implied consent statute provides: "Any person who operates a motor vehicle within this state is deemed to have given consent, subject to the provisions of RCW 46.61.506, to a test or tests of his or her breath for the purpose of determining the alcohol concentration in his or her breath if arrested for any offense where, at the time of the arrest, the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug or was in violation of RCW 46.61.503." RCW 46.20.308(1).

"To trigger the implied consent statute, there must be both a valid arrest and reasonable grounds for the arresting officer to believe that the driver was driving under the influence at the time of the arrest." State v. Avery, 103 Wn. App. 527, 534, 13 P.3d 226 (2000). A lawful arrest is an indispensable element triggering the motorist's implied consent to a breath or blood test. State v. Wetherell, 82 Wn.2d 865, 869, 514 P.2d 1069 (1973); O'Neill v. Dep't of Licensing, 62 Wn. App. 112, 116, 813 P.2d 166 (1991). "The requirement of reasonable grounds is separate from the requirement of probable cause to arrest." O'Neill, 62 Wn. App. at 116.

Consistent with case law interpreting the statute, the State argued the breath test results were admissible under the implied consent statute so long as police have probable cause for any arrest, and here the original arrest was for driving with a suspended license. RP 19; CP 71. "So the arrest originally was for driving suspended and then -- after they started searching him, the other observations came to light, here." RP 19. The State argued Schroder's refusal to take the field sobriety or portable breath tests also contributed to probable cause. RP 19-20.

Consistent with the State's argument, the court acknowledged Schroder was initially arrested for driving with a suspended license. RP 21. "They found out he was suspended and then -- after further -- officers smelled alcohol and -- speech was slurred, his eyes were watery, so -- I mean, there was to me an abundance of probable cause in this case." RP 22. "[T]o me it's pretty clear-cut that there was probable cause to arrest him for -- at first for driving while license suspended and that evolved into a DUI upon -- further investigation by Dep. Cox." RP 23.

Under RCW 10.31.100(3), "police officers may arrest a person without a warrant if they have probable cause to believe that the person is driving with a suspended driver's license."<sup>4</sup> State v. Gaddy, 152 Wn.2d

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<sup>4</sup> RCW 46.20.345 provides: "Any resident or nonresident whose driver's license or right or privilege to operate a motor vehicle in this state has

64, 70, 93 P.3d 872 (2004). Police initially arrested Schroder for driving with a suspended license. The threshold question, then, is whether police had probable cause to arrest him for this offense.

The court's written findings do not establish that police had probable cause to arrest Schroder for driving with a suspended license. The court's findings do not cite to any information upon which police relied to arrest Schroder for driving with a suspended license. This is unsurprising because the State presented no such information at the CrR 3.6 hearing. The State simply elicited the fact that police initially placed Schroder under arrest for driving while suspended. RP 162, 171. The State did not elicit any facts to support the officer's belief that this offense had been committed. This omission is fatal to the State's position. The State failed to present evidence that the source of the officer's information that Schroder's license had been suspended was trustworthy, and thus the trial court should have granted the motion to suppress.

"Where police have made a warrantless arrest, the state bears the burden of proving the reliability of the information that formed the basis of probable cause." State v. Gaddy, 114 Wn. App. 702, 706, 60 P.3d 116

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been suspended or revoked as provided in this title shall not operate a motor vehicle in this state under a license, permit, or registration certificate issued by any other jurisdiction or otherwise during such suspension or after such revocation until a new license is obtained when and as permitted under this chapter."

(2002), aff'd, 152 Wn.2d 64, 93 P.3d 872 (2004). For example, when police rely on a dispatch report or database to arrest, the information contained in the dispatch or database must be shown to be reliable. See State v. O'Cain, 108 Wn. App. 542, 545, 31 P.3d 733 (2001) (suppressing evidence because "the record in this case contains no evidence from which the underlying reliability of the police dispatch can be assessed"); Mance, 82 Wn. App. at 542-45 (arrest for stolen vehicle based on outdated stolen vehicle report meant police lacked probable cause to arrest).

Here, the State presented no testimony regarding the source of the officer's knowledge that Schroder was driving with a suspended license. There is no way to assess "the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information" because the State presented no such facts to justify the warrantless arrest for driving while suspended. Terrovona, 105 Wn.2d at 643. Again, "the burden is on the State to establish the reliability of the [information] when the validity of a warrantless search or seizure is at issue." State v. Sandholm, 96 Wn. App. 846, 848, 980 P.2d 1292 (1999). The State failed to meet its burden here. The State failed to prove the arrest for driving while suspended was lawful, i.e., supported by probable cause. The implied consent statute therefore did not give police authority to administer the breath test.

"Probable cause to arrest must be judged on the facts known to the arresting officer before or at the time of arrest." State v. Gillenwater, 96 Wn. App. 667, 670, 980 P.2d 318 (1999), review denied, 140 Wn.2d 1004, 999 P.2d 1262 (2000). "Information obtained after the arrest may not be used to retroactively justify it." Gaddy, 114 Wn. App. at 706. Whatever police learned after the initial arrest for driving while suspended cannot be used to justify the initial seizure.

"A lawful arrest is a prerequisite to the application of the implied consent statute." O'Neill, 62 Wn. App. at 116. The subsequent arrest for DUI is not a lawful arrest because it is based on information obtained as a result of the initial unlawful arrest for driving while suspended. Deputy Cox relied on information discovered *after* the initial arrest as the basis to believe Schroder was driving under the influence. As Cox testified, "As Dep. Olin was speaking with him about his driving I could definitely smell the odor of intoxicants coming from his breath. His speech was very slow and slurred when he spoke. I also could see that his eyes were bloodshot and watery." RP 10. Cox made these observations after Schroder was placed under arrest for driving with a suspended license. RP 12. Schroder was being searched at this point pursuant to that arrest. RP 12.

Where the initial seizure is unlawful, subsequently discovered evidence is tainted fruit of the poisonous tree and therefore inadmissible.

State v. Walker, 129 Wn. App. 572, 575, 119 P.3d 399 (2005), review denied, 156 Wn.2d 1036, 134 P.3d 1170 (2006); State v. Le, 103 Wn. App. 354, 360, 12 P.3d 653 (2000). Evidence that police relied on to arrest for DUI was gathered following the illegal arrest for driving while suspended. That evidence cannot establish a lawful DUI arrest because the evidence relied on to show probable cause for the DUI arrest is tainted by the initial illegality. See State v. Eisfeldt, 163 Wn.2d 628, 640-41, 185 P.3d 580 (2008) (evidence from first illegal seizure could not be used to support probable cause in subsequent search warrant).

**b. The evidence gathered due to the initial unlawful arrest must be suppressed, requiring reversal of the conviction.**

"The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means." State v. Duncan, 146 Wn.2d 166, 176, 43 P.3d 513 (2002). Evidence obtained directly or indirectly from an unlawful search or seizure, including inculpatory statements of the defendant, must be suppressed under the fruit of the poisonous tree doctrine. State v. Mayfield, \_\_\_ Wn. 2d \_\_\_, 434 P.3d 58, 69 (2019); Wong Sun v. United States, 371 U.S. 471, 485-86, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). "Our state exclusionary rule requires the suppression of evidence obtained in violation of article I, section 7, with no exceptions that rely on

speculation, the likelihood of deterrence, or the reasonableness of official misconduct." Mayfield, 434 P.3d at 69.

The breath test results are fruit of the poisonous tree because they were obtained as a result of the illegal arrest. More than that, the unlawful seizure led to police observation of Schroder's signs of intoxication, including bloodshot, watery eyes and slurred speech.<sup>5</sup> The arrest unsupported by probable cause also led to obtaining Schroder's statements about drinking that night and his refusal to submit to the field sobriety tests. All of this is fruit of the poisonous tree because it is "evidence obtained as a direct or indirect result of an article I, section 7 violation." Mayfield, 434 P.3d at 69.

"Admission of evidence obtained in violation of either the federal or state constitution is an error of constitutional magnitude." State v. Keodara, 191 Wn. App. 305, 317, 364 P.3d 777 (2015), review denied, 185 Wn.2d 1028, 377 P.3d 718 (2016). Such error "is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). "A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same

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<sup>5</sup> Video of the encounter does not show the quality of Schroder's eyes due to darkness. Ex. 8. Schroder arguably does not exhibit any slurred speech in the video.

result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." State v. Burke, 163 Wn.2d 204, 222, 181 P.3d 1 (2008). The State cannot overcome the presumption of prejudice here.

Without the breath test results, there is no remaining evidence to support the conviction under that alternative means of committing the crime. Because the jury did not return a special verdict specifying which means it relied upon, the conviction must be reversed. See In re Detention of Pouncy, 168 Wn.2d 382, 391-92, 229 P.3d 678 (2010) (new trial required where one alternative means was tainted by error and jury did not specify which means it relied upon).

Further, without evidence that Schroder had bloodshot, watery eyes and slurred speech and admitted to drinking, the evidentiary support for the other alternative means of committing the offense is undermined. The State understandably relied on this evidence in arguing for a guilty verdict on this means. RP 252. Without that evidence, the conviction cannot stand on this basis either. The conviction must be reversed.

**D. CONCLUSION**

For the reasons stated, Schroder requests reversal of the conviction.

DATED this 4<sup>th</sup> day of March 2019

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

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# APPENDIX A



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF WHITMAN

STATE OF WASHINGTON  Plaintiff,  vs.  EVAN DANIEL SCHRODER,  Defendant.	Case No.: 17-1-00238-38  <b>FINDINGS OF FACT AND CONCLUSIONS OF LAW</b>
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This matter came before the Court on Defendant's Motion to Suppress filed on February 23, 2018. A hearing was held on July 18, 2018. The Court having considered briefing by both parties, hearing testimony of Deputy Tim Cox, viewing body camera footage, and after hearing oral argument from both parties, finds as follows:

FACTS

1. On October 28, 2017, Deputy Tim Cox, Deputy Chris Olin, and Sgt. Dan Brown responded to a call of shots fired in the town of Tekoa.
2. The Deputies responded and spoke with the reporting party.
3. After speaking with the reporting party, Deputies obtained a description of the vehicle which had left the scene and believed that Evan Schroder, the Defendant was the driver.

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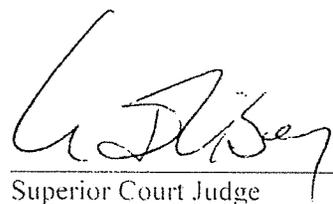
- 1 4. Based on the information provided, the Deputies began to search the town of Tekoa for the  
2 suspect vehicle.
- 3 5. Deputy Olin was the first to observe the vehicle.
- 4 6. Deputy Olin activated his emergency lights and the Defendant drove several more blocks,  
5 driving through several stop signs, before bringing his vehicle to a stop.
- 6 7. Once the vehicle was stopped, the Defendant exited his vehicle and ran to some nearby  
7 buildings.
- 8 8. The Defendant was eventually found and taken into custody.
- 9 9. Once apprehended, Deputy Cox observed that the Defendant had blood shot and watery  
10 eyes, that his speech was slow and slurred, and that the Defendant had the odor of alcohol on  
11 his person.
- 12 10. Deputy Cox asked the Defendant several times if he would be willing to perform Field  
13 Sobriety tests but the Defendant would never give a direct answer.
- 14 11. Deputy Cox asked the Defendant if would submit to a portable breath test and the Defendant  
15 refused.
- 16 12. The Defendant was eventually arrested for DUI.

17  
18  
19  
20 CONCLUSION

- 21 1. The Court finds that based on the information above, Deputy Cox had probable cause to  
22 arrest the Defendant for DUI.
- 23 2. Because Deputy Cox had probable cause to arrest for DUI, the Defendant's BAC results are  
24 admissible at trial.

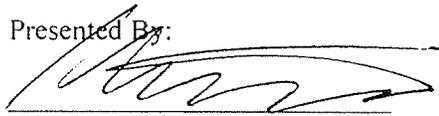
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July 10, 2018



Superior Court Judge

Presented By:



Merritt Decker, WSBA# 46248

Agreed as to Form

Electronic Approval  
Steve Martonick, WSBA# 32212

**NIELSEN BROMAN & KOCH, PLLC**

**March 04, 2019 - 4:32 PM**

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**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 36320-1  
**Appellate Court Case Title:** State of Washington v. Evan D. Schroder  
**Superior Court Case Number:** 17-1-00238-5

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